SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-703

CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, *Petitioner*

v.

VEEDER-ROOT COMPANY
A Division of Veeder Industries, Inc.,
Respondent

Amicus Curiae Brief in Support of Petition for Writ of Certiorari

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF

LOWER COURT OPINION

The opinion of the Supreme Court of the State of Connecticut is reported at — Conn. —, — A.2d — (1973). [Opinion is unofficially reported at 6 E.P.D. ¶ 8958). The opinion of the Superior Court of Hartford County, Connecticut is unofficially reported at 4 E.P.D. ¶ 7801 (1972)]

INTEREST OF AMICUS CURIAE

The interest of the International Association of Official Human Rights Agencies (IAOHRA) arises because it is an umbrella organization consisting of 87 member and 500 constituent state and local civil rights agencies throughout the country, all of whom are charged with the enforcement of fair employment practices (FEP) laws similar to that of Connecticut. The issues raised in this case are not isolated to Connecticut but are experienced in varying degrees by all nonfederal civil rights agencies. Affirmance of the decision below would result in the establishment of two different standards for discriminatory conduct; one under state law, another federal law. The consequences of this decision would impose a much more lenient standard of conduct upon employers subject to state fair employment practices laws and of necessity impose a strict curtailment upon the state enforcement agency to remedy discriminatory conduct found to exist.

The interest of the State of Maryland Commission on Human Relations arises because it has been subjected to a state judicial interpretation identical to the issues presented here. *Ferguson* v. *United Parcel Service,* — Md.—, — A 2d — (No. 130, filed Nov. 6, 1973) (unofficially reported in 6 E.P.D. 8926 (1973). The Maryland Commission will also seek to obtain review by this Court of its state court's interpretation of its antidiscrimination law at the appropriate time. The Maryland's FEP Law and administrative structure are identical to that of Connecticut.

The issue identified by the decision below is facially only a question of state administrative procedure, i.e., the type of notice required in advance of a public

hearing on charges of employment discrimination. However, the deeper issues involve the full enforcement of constitutionally protected rights and remedies and the vitality of state agencies created to protect and enforce those rights and remedies.

AMICUS CURIAE AUTHORITY

IAOHRA and the State of Maryland Commission on Human Relations have obtained the consent of all parties to file a brief amicus curiae pursuant to Rule 42(1) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether a state court can constitutionally impose upon an individual victim of discriminatory employment practices a procedure which denies her the ability to vindicate rights and seek remedies for herself and those of the class she represents in violation of a national policy to promote the effective enforcement of civil rights laws on a local level?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statues involved are Conn. Gen. Stat. §§ 31-123 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). The constitutional provisions are Article VI, Sec. 2 and the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The statement set forth in Petitioner's Brief is adopted by *Amici* and incorporated herein by reference.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The "Reason for Granting the Writ" as recited in Petitioner's brief are adopted by *Amici* and incorporated herein by reference.

In addition, *Amici* urge this Court to grant a Writ of Certiorari for the following reasons:

ARGUMENT

INSTRUMENTALITIES OF THE STATE HAVE A CONSTITUTIONAL DUTY TO REMEDY EMPLOYMENT PRACTICES FOUND TO BE DISCRIMINATORY AND CANNOT AVOID THIS DUTY BY THE ERECTION OF PROCEDURAL BARRIERS WHICH ALLOW THE DISCRIMINATORY PRACTICES TO CONTINUE UNABATED.

A. Introduction

The Connecticut court's refusal to sustain the action of the Connecticut Commission which ordered Respondent to eliminate certain employment practices found to be unlawful misconstrues the Commission's law enforcement process and severely limits its ability to execute its statutory and constitutional mandate to eliminate any and all employment practices found to be discriminatory.

Mrs. Moe, by filing her complaint, asserted rights which are identical under both federal and state law and are guaranteed under the federal constitution. Relief provided under the state scheme must be substantially similar to that provided under federal law. In effect, once the state has adopted the federal law as its own, it must therefore adhere to federal standards to eliminate discrimination or it becomes involved in unconstitutional state action. *Bush* v. *Orleans Parish School Board,* 308 F.2d 491 (5th Cir. 1962).

The Connecticut Commission had a duty under the Fourteenth Amendment of the U.S. Constitution to eliminate discrimination it discovered. It is firmly established that state civil rights agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969); *State of Minnesota* v. *Bergeron,* 290 Minn. 351, 187 N.W. 2d 680 (1971); *see also, Betts* v. *Easley,* 161 Kan. 459, 169 P. 2d 831 (1946).

In *Testa* v. *Katt,* 330, 386 (1947), this Court ruled that the state court's failure to apply federal standards was in violation of Article VI, Section 2, of the U. S. Constitution which binds state judges to the "supreme law of the land." In effect, this Court ruled that a state judicial body could not, under the supremacy clause, deviate from national policy and ignore the necessity of full application of federal rights. Again this Court in *Sullivan* v. *Little Hunting Park, supra,* reaffirmed this position when it granted review of and then reversed the decision of the Virginia Supreme Court of Appeals for failure to act in accordance with federal anti-discrimination standards when the state decision ostensibly turned upon a state procedural issue. In so holding, this Court observed that:

> "We held in *Jones* v. *Mayer Co.* . . . that although § 1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an effective remedy . . . That federal remedy for the protection of a federal right is available in the state court if that court is empowered to grant injunctive relief generally as is the Virginia Court . . . *Id.* at 238 [citations omitted].

With respect to the instant case, the Connecticut Commission could not disregard the discriminatory practices of the Respondent or its failure to do so could be construed as unconstitutional state action. That is, the failure to actively seek out and eliminate discrimination makes the state agency or reviewing state courts instruments of discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). This Court stated in *Burton* that "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them . . ." *Id.* at 725. If it does not act, the state becomes a joint participant in the illegal discrimination by permitting it to continue unabated. *Evans* v. *Newton,* 382 U.S. 296 (1966); *State of Minnesota* v. *Bergeron, supra;* see also, *Potts* v. *Flax,* 313 F. 2d 284, 289 (5th Cir. 1963); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 34 (5th Cir. 1968).

This approach was followed in *Gilliam* v. *City of Omaha,* 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds,* 459 F. 2d (8th Cir. 1972). There the court required the Nebraska Equal Opportunity Commission to enforce not only state civil rights laws but also Fourteenth Amendment prohibitions against discrimination. In holding that the state Commission could not refrain from awarding remedies available under the federal civil rights scheme, the court remarked that:

> If punitive damages are necessary to fully vindicate a constitutional right, when that right is before a federal court, then such damages are every bit as necessary when that right is before a state administrative commission or a state court. Basic federal constitutional rights cannot be watered down by state statutes or state court opinions. *Id.* at 8. [Citation Omitted].

Additionally, a delicate federal-state relationship could be infringed by a holding that the Connecticut Commission cannot grant rights and remedies substantially equivalent to federal law. The Connecticut FEP law purports to create rights and remedies identical to those created by federal law. The federal FEP law encourages states to develop rights consonant with federal law. See, *Note, Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 82 Harv. L. Rev. 832, 843 (1969).

Title VII provides an opportunity for the Connecticut Commission to deal with employment discrimination charges first. 42 U.S.C. 2000 e-5(b) (1970). With the passage of this Act, Congress clearly intended to promote the concept of federalism by insuring that the federal civil rights scheme is implemented on a local level, believing this to be the most effective means of eliminating discrimination. In fact, the local enforcement provision was a cornerstone of the federal act. See, *Note, Development in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1212-1216 (1971).

Despite the national policy to provide for uniform enforcement of civil rights laws on a local level, recent decisions of the highest courts of three states have taken conflicting positions regarding the type of administrative notice required of a state civil rights agency to provide class remedies to eliminate discriminatory employment practices. Two of these state court decisions are repugnant to the Federal Constitution in that they permit employment practices to continue despite unchallenged findings that the practices are discriminatory on the basis of sex and race.

The Supreme Court of Iowa, when faced with the same issue of administrative notice presented here, applied federal standards to an individual charge of discrimination and held the notice sufficient to permit the state civil rights agency to afford class relief, thus satisfying its constitutional duty. *Ironworkers Local No. 67* v. *Hart,* 191 N.W. 2d 758 (1971). However, the Connecticut court below and the Maryland Court of Appeals in *Ferguson* v. *United Parcel Service,*— Md. —, — A.2d— (No. 230, filed Nov. 6, 1973) (unofficially reported in 6 E.P.D. ¶ 8926) adopted a strict and unconstitutional notice standard which disregards the decisions of this Court regarding the definition of the term "discrimination," the status occupied by a person charging discriminatory employment practices, and the technical formalities required of such a person.

B. Nature of Discrimination

In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) this Court stated that employment practices that operate as artificial, arbitrary and unnecessary barrier to employment opportunities on the basis of race or other classes are prohibited under federal law. This concept was also applied to an individual plaintiff in *McDonald Douglas* v. *Green,* — U.S. —, 93 S. Ct. 1817 (1973). Discriminatory employment practices on the basis of sex have also been condemned. *Frontiero* v. *Richardson,* — U.S. —, 93 S. Ct. 1764 (1973).

When a person like Hilda G. Moe alleges employment discrimination, that allegation requires an examination of the consequences of the challenged employment practice upon all members of Ms. Moe's class, that is, females. The very term "discrimination" has been defined to mean unlawful conduct directed at a class. *Hall* v. *Wertham Bag Corp.,* 251 F.Supp. 184 (M.D.

Tenn. 1966). Indeed, employment discrimination is considered to be an unlawful practice involving a class characteristic. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). The Respondent's practices, not any individual treatment, were found to have victimized Ms. Moe. It is impossible to separate Ms. Moe from either the application of these practices or from her class characteristic. Therefore, in order to establish that Ms. Moe was a victim of sex discrimination, the general employment practices at Respondent's facility must be examined and then remedied, if discriminatory.

C. Status Occupied by a Person Charging Discriminatory Employment Practices

A person like Ms. Moe is viewed not only as an aggrieved person seeking to make herself whole, but also a private attorney general vindicating her rights and the rights of all those persons similarly situated. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Graniteville Co., Sibley Division* v. *EEOC*, 438 F.2d 32 (4th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1970). Therefore, a general inquiry arising from her individual complaint was proper since the employment practices which can discriminate against a complainant can discriminate against others similarly situated.

In addition, the concept of Ms. Moe operating as a private attorney general has the effect of reducing the incidence of recurring claims, relieving the workload of state and federal civil rights agencies,[1] reducing

[1] EEOC Chairman William H. Brown, III, stated that EEOC's current national backlog amounts to over 60,000 cases and is projected to exceed 90,000 by the end of 1974. The New York Times, July 30, 1973, p. 17, Col. 8. See also Crampton, *Causes and Cures of Administrative Delay*, 59 A.B.A.J. 937 (Sept. 1972).

inconvenience to employers, and promptly vindicating the public interest. It would be absurd if each member of the class discriminated against had to individually seek relief. The term "discrimination" and prohibited employment practices are not and should not be controlled by procedural sections of the FEP law; but rather should be controlled by the substantive provisions of law. Consequently, the purpose of an individual charge of discrimination like Ms. Moe's is merely to initiate the subsequent law enforcement process, and does not determine the limits of that process. *Graniteville Co., Sibley Division* v. *EEOC, supra; Jenkins* v. *United Gas Corp., supra; Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

The concept of the charging party acting as a private attorney general has special applicability to the Connecticut Commission. Like civil rights agencies established in forty states to enforce (FEP) laws,[2] the Connecticut Commission in form and operation was patterned after the National Labor Relations Board (NLRB) upon which Congress conferred special jurisdiction to handle the complex problems of labor relations. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959). The NLRB has been held to possess authority to vindicate the rights of the public. *Nathanson* v. *NLRB,* 344 U.S. 25, 27 (1952);

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[2] 3 CCH Employment Practices Guide ¶ 29,080, (1973). For a study of State FEP agencies *see,* Tierney, *Separate But Equal—An Analysis of State Civil Rights Law Enforcement and its Interaction with Federal Law,* 49 Notre Dame Lawyer, 205 (1973); Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws,* 42 N.Y.U. L.Rev. 823, 1035 (1967); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study,* 18 Vand. L. Rev. (1965)

West Kentucky Coal Co., 116 F.2d 816 (6th Cir. 1940); cf. *Jenkins* v. *United Gas Corp., supra.* Similarly, states civil rights agencies have been held to be like the NLRB in that they exercise full powers to vindicate the rights of the public as well as private rights. *City of Highland Park* v. *Michigan Fair Employment Practices Commission,* 364 Mich. 508, 111 N.W. 2d 297 (1961); *Arnett* v. *Seattle General Hospital,* 65 Wash. 2d 22, 395 P. 2d 503 (1964). Such state civil rights agencies are, in effect, public prosecutors of violations of antidiscrimination laws. Jones, *Disestablishment of Labor Unions for Engaging in Racial Discrimination—A New Use for an Old Remedy,* 1972 Wisc. L. Rev. 351, 354 (1972).

D. Technical Formalities Required of Persons Charging Discrimination

A person like Ms. Moe is not charged with having full knowledge of civil rights laws. Ms. Moe or other aggrieved persons may believe that discrimination has occurred but may be unable to perceive or understand all the sources, effects, patterns or practices of an employer's system upon their own personal case of discrimination. The FEP law contemplates the filing of charges by persons untutored in the technicalities of the law and who may not be able to fully articulate their grievances. *Love* v. *Pullman,* 404 U.S. 522 (1972); *Jenkins* v. *United Gas Corp., supra.*

There is no basis under state law for giving a different meaning and effect to an individual complaint than permitted under federal law. Indeed, the Connecticut law like federal law provides two methods to set the administrative process in motion—a charge by an indi-

vidual and a charge by the Commission itself. *Compare,* Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e 5(a)(1970). Both methods merely provide alternative means to set the administrative process in motion. Neither method does more than invoke the same law enforcing powers recited elsewhere in the statute. Sutin, *The Experience of State Fair Employment commissions: A Comparative Study,* 18 Vand. L. Rev. 965, 1019 (1965).

The purpose of the Commission initiated complaint is not to operate as the exclusive means to provide class relief. Its purpose is clearly designed to permit the Commission to act in all areas of discrimination *in the absence of an aggrieved party* filing a verified complaint. Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1236-1239 (1971).

> The particular virtue of complaints initiated by Commissions is that they can be directed against the worst offenders. This authority is necessary to deal with businesses and unions which have not opened up employment or other opportunities to any minority, and against whom complaints are rarely filed. It is also needed to deal with those areas in which it is very difficult for one discriminated against to know whether discrimination has occurred, as is typically the case of employment agencies. Witherspoon, *Civil Rights Policy in the Federal System, Proposals for a Better Use of the Administrative Process,* 74 Yale L.J. 1171, 1191-92 (1965).

Whether a complaint is filed by an individual or the Commission is immaterial to the scope of the remedy. *Bowe* v. *Colgate-Palmolive Co., supra.* The only issue

is what remedy is appropriate to eliminate discrimination. Since discrimination was found to exist at Respondent's facility, the proper and necessary remedy was to eliminate the discrimination. The Commission's order did no more than remedy a discriminatory practice.

Even applying strict judicial standards concerning class actions to the administrative actions of the Commission, it is clear under Title VII that such standards were satisfied by the Commission's order of relief.

> Although most Title VII actions are brought by prvate individuals, there is also a public interest in the outcome of the lawsuit. While this public interest should not unduly delay the complainant from getting his private remedy if that is all he seeks, a qualified complainant who wishes to represent a broader class should be permitted to do so. Moreover, since a violation of the Act is by definition a class-wide discrimination, even the purely private litigant almost always represents interests larger than his own. For these reasons class-wide relief is almost always an appropriate remedy. Note, *Development is the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1218-1219 (1971).

This proposition finds ample support in decisions of the federal courts. *Bowe* v. *Colgate-Palmolive Co., supra; Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194 (7th Cir. 1971); *Jenkins* v. *United Gas Corp., supra; Hall* v. *Wertham Bag Corp., supra.*

> [T]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated. *Bailey* v. *Patterson,* 323 F.2d 201, 207 (5th Cir. 1963).

The Connecticut Court's distinction between a class action and an individual charge was inconsistent with these principles.

The notion that class relief should be withheld because Respondent may not have understood the nature of Ms. Moe's individual charge is equally inconsistent with the nature of discrimination and the state of the law. It should not be required that Respondent receive more than fair notice prior to hearing. DAVIS ADMINISTRATIVE LAW § 8.02 (3 ed. 1972). As the record indicates, notice of the nature of the hearing was provided Respondent. Having been given notice of the issues, Respondent should not be accorded any more latitude than that accorded other Respondents under Title VII of the federal law. *McDonnell-Douglas Corp.* v. *Green, supra; Sprogis* v. *United Air Lines, supra; Bowe* v. *Colgate-Palmolive Co., supra.*

Moreover, class action procedural requisites do not properly apply to administrative agencies. It has been held that administrative tribunals have power ". . . when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest . . . ." *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 516 (1944) [Citations omitted]. Administrative agencies have been accorded far more flexibility in procedures than the courts. *Lacomastic Corp.* v. *Parker,* 54 F. Supp. 138 (D. Md. 1944); DAVIS, ADMINISTRATIVE LAW § 8.02 (3 ed. 1972).

For example, agencies similar to the Commission have been permitted to formulate public interest remedies without regard to class action procedures. The

NLRB operates under procedural provisions that are virtually identical to the Commission. 29 U.S.C. § 160 (1970). Yet NLRB proceedings have been held to be looking to the public interest in bringing unfair labor practices to an end *NLRB* v. *West Kentucky Coal Co.*, 116 F.2d 816 (6th Cir. 1940); *Agwilines, Inc.* v. *NLRB*, 87 F.2d 146 (5th Cir. 1936). The NLRB may issue cease and desist orders against activities found to be unfair labor practices. *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied* 387 U.S. 942 (1967). The power of the NLRB is not limited to correction of past unlawful practices; it has the power and the duty to prevent future practices. *NLRB* v. *Kelly & Picerve, Inc.*, 298 F.2d 895 (1st Cir. 1962). Certainly a state civil rights agency has the same power and duty. Cf., *Griggs* v. *Duke Power Co., supra; see Louisiana* v. *United States*, 380 U.S. 145 (1965).

CONCLUSION

Finally, it is important to reiterate that the Connecticut and federal FEP laws are substantially the same. The basis of Ms. Moe's charge was founded upon state and federal laws and constitutional principles. Ms. Moe should not be denied class relief by a state court for asserting a claim to which she would have obtained relief under the federal scheme. Under our federal system, the implementation of these two FEP laws should be congruent thereby reducing necessary duplication of effort. Indeed, if the Commission is to continue as a viable operation, it must be permitted to apply rights and remedies substantially equivalent to federal law.

For the foregoing reasons, it is urged that the Court grant Petitioner Writ of Certiorari.

Respectfully submitted,

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BRIEF FOR RESPONDENT IN OPPOSITION

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